

No. 17 -
IN THE SUPREME COURT OF THE
UNITED STATES

JEAN PIERRE RICES,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

CLIFF GARDNER
Counsel of Record
RUDOLPH ALEJO
1448 San Pablo Avenue
Berkeley, CA 94702
Telephone: (510) 524-1093
Facsimile: (510) 527-5812
Casetris@aol.com

Attorneys for Petitioner
Jean Pierre Rices

CAPITAL CASE

QUESTIONS PRESENTED

1) California law permits prosecutors to ask jurors to impose death on a defendant based on conduct the defendant committed when he was a child. The prosecutor here did just that.

In a series of cases this Court has recognized the substantial differences between children and adults in connection with a child's sense of responsibility, the impact of punishment on deterring future behaviors and the likelihood children will make cost-benefit analyses of possible adverse consequences. *See Roper v. Simmons*, 543 U.S. 551(2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012). In *Graham* the Court recognized what every parent knows -- "the likelihood that the teenage offender has made . . . [a] cost-benefit analysis . . . is so remote as to be virtually nonexistent." 560 U.S. at 572.

In light of these fundamental differences between children and adults, may criminal prosecutors still urge juries to impose death based on conduct a defendant committed as a child?

2) At his capital penalty phase, petitioner offered to introduce evidence showing the impact of his execution on his surviving family members. Pursuant to California law, the trial court barred such evidence.

Nearly four decades ago, this Court held that for jurors to understand *defendant's* “uniqueness” as an individual, states could not bar mitigating evidence in a capital case. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Thirteen years later the Court reached a parallel holding that for jurors to understand the *victim's* “uniqueness” as an individual, the state could permit consideration victim impact testimony about the impact of the victim’s death on surviving family members. *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

The case asks the Court to resolve a stark split of authority in the state and federal courts that has developed in the wake of *Lockett* and *Payne*. May California bar capital defendants from presenting “execution impact” testimony -- testimony about the impact of the defendant’s execution on defendant’s family members -- as a way of showing the defendant’s uniqueness as a human being?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING CERTIORARI	4
ARGUMENT	7
I. CERTIORARI SHOULD BE GRANTED TO DECIDE IF THE EIGHTH AMENDMENT PERMITS JURORS TO IMPOSE DEATH ON A DEFENDANT BASED, IN PART, ON PRIOR CRIMINAL CONDUCT THE DEFENDANT COMMITTED AS A CHILD.	7
II. CERTIORARI IS APPROPRIATE TO RESOLVE A SPLIT OF AUTHORITY AS TO WHETHER THE STATE MAY BAR A DEFENDANT FROM PRESENTING EVIDENCE ABOUT THE IMPACT OF AN EXECUTION ON THE DEFENDANT’S FAMILY.	15
CONCLUSION	22
APPENDIX: Appendix A - Opinion of the California Supreme Court	23

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Booth v. Maryland</i> , 482 U.S. 496	17
<i>Clay v. American Tobacco Co.</i> , 188 F.R.D. 483	12
<i>Eddings v. Oklahoma</i> , 455 U.S. 104	14, 16, 18
<i>Goodyear Tire & Rubber Co. v. Haeger</i> , ___ U.S. ___, 137 S.Ct. 1178	21
<i>Graham v. Florida</i> , 560 U.S. 48	passim
<i>Hall v. United States</i> , 566 U.S. 506	21
<i>J.D.B. v. North Carolina</i> , 564 U.S. 261	13
<i>Jackson v. Dretke</i> , 450 F.3d 614	20
<i>Lockett v. Ohio</i> , 438 U.S. 586	16, 18
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525	12
<i>Miller v. Alabama</i> , 567 U.S. 460	8, 9, 10, 11
<i>Mississippi ex rel. Hood v. AU Optronics Corp.</i> , ___ U.S. ___, 134 S.Ct. 736	21
<i>Missouri v. McNeely</i> , 569 U.S. 141	21
<i>Payne v. Tennessee</i> , 501 U.S. 808	passim
<i>Richmond v. Lewis</i> , 506 U.S. 50	19
<i>Richmond v. Ricketts</i> , 640 F.Supp. 767	19
<i>Roper v. Simmons</i> , 543 U.S. 551	8, 11, 12
<i>Skipper v. South Carolina</i> , 476 U.S. 1	16
<i>Smith v. Texas</i> , 543 U.S. 37	16
<i>Spencer v. Georgia</i> , 500 U.S. 960	6
<i>Stenson v. Lambert</i> , 504 F.2d 873	20

<i>Teague v. Lane</i> , 489 U.S. 288	6
<i>Tennard v. Dretke</i> , 542 U.S. 274	16
<i>United States v. Castleman</i> , ___ U.S. ___, 134 S.Ct. 1405	21
<i>United States v. Con-Ui</i> , 2017 WL 1410913	19
<i>United States v. Fell</i> , 2005 WL 1634067	19
<i>United States v. Taylor</i> , 814 F.3d 340	20
<i>Virginia v. Harris</i> , 558 U.S. 978, 130 S.Ct. 10	21

STATE CASES

<i>Burns v. State</i> , 699 So.2d 646	19
<i>Commonwealth v. Harris</i> , 817 A.2d 1033	19
<i>Compare State v. Mann</i> , 934 P.2d 784	20
<i>People v. Balderas</i> , 41 Cal.3d 144	4
<i>People v. Bivert</i> , 52 Cal.4th 96	7
<i>People v. Gurule</i> , 28 Cal.4th 557	7
<i>People v. Lee</i> , 51 Cal.4th 620	7
<i>People v. Malone</i> , 47 Cal.3d 1	4, 7, 10
<i>People v. Rices</i> , 4 Cal.5th 49	1
<i>People v. Rices</i> , 406 P.3d 788	8
<i>People v. Tully</i> , 54 Cal.4th 952	11
<i>Roberts v. State</i> , 220 S.W.3d 521	19
<i>State v. Benn</i> , 845 P.2d 289	20
<i>State v. Carr</i> , ___ U.S. ___, 136 S.Ct 633	18
<i>State v. Carr</i> , 300 Kan. 1	18
<i>State v. Loftin</i> , 680 A.2d 677	19

<i>State v. Rhines</i> , 548 N.W.2d 415	18
<i>State v. Rogue</i> , 141 P.3d 368	20
<i>State v. Simmons</i> , 944 S.W.2d 165	18
<i>State v. Stenson</i> , 940 P.2d 1239	20
<i>State v. Stevens</i> , 879 P.2d 162	18
<i>Williams v. State</i> , 168 S.W.3d 433	19
<i>Woods v. State</i> , 13 So.3d 1	19

FEDERAL STATUTES

28 U.S.C. § 1257	2
28 U.S.C. § 2254	6, 20

STATE STATUTES

Ala. Code § 22-17A-2	13
Alaska Stat. Ann. §08.13.217	13
Ariz. Rev. Stat. Ann. § 13-3721	13
Ark. Stat. Ann. § 5-27-228	13
Cal. Penal Code § 653	13
Cal. Penal Code section 190.3	7
Col. Rev. Stat. Ann. § 25-4-2103	13
Conn. Gen. Stat. § 19a-92g	13
Del. Code Ann. Title 11, Ch 5 § 1114	13
Fla. Stat. § 877.04	13
Ga. Code §16-5-71	13
Hawaii Rev. Stat. § 321-379	13
Idaho Code § 18-1523	13

Ind. Code Ann. § 35-42-2-7	13
Iowa Code § 135.37	13
Kan. Stat. Ann. § 65-1953	13
Ky. Rev. Stat. § 211.760	13
La. Rev. Stat. Ann. § 14:93.2	13
Me. Rev. Stat. Ann. Title 32, Ch. 63 § 4203	13
Mich. Comp. Laws Ann. § 333.13102	13
Minn. Stat. § 609.2246	13
Miss. Laws § 73-61-1	13
Mo. Rev. Stat. § 324.520	13
Mont. Code Ann. § 45-5-623	13
N.C. Gen. Stat. § 14-400	13
N.D. Cent. Code § 12.1-31	13
N.J. Stat. Ann. § 2C:40-21	13
Neb. Rev. Stat. § Sec. 427 71-3	13
Ohio Rev. Code Ann. § 3730.06	13
Okla. Stat. Title 21 § 842.1, 842.2	13
Pa. Cons. Stat. Title 18 § 6311	13
RI General Laws § 11-9-15	13
S.C. Code Ann. § 44-34-60	13
S.D. Codified Laws Ann. § 26-10-19	13
Tenn. Code Ann. § 62-38-207	13
Texas Health and Safety Code Ann. § 146.012	13
Utah Code Ann. § 76-10-2201	13

Va. Code § 18.2-371.3	13
Vt. Stat. Ann. Title 26 § 4102	13
W. Va. Code § 16-38-3	13
Wash. Rev. Code § 26.28.085	13
Wis. Stat. §948.70	13
Wyo. Stat. § 14-3-107	13

MISCELLANEOUS

<u>United States v. Basciano</u> , No. 1:05-cr-60	19
<u>United States v. O'Reilly</u> , No. 2:05-cr-80025	19
<u>United States v. Ronell Wilson</u> , No. 04-1016	19
<u>United States v. Savage</u> , No. 07-550-03	19
<u>United States v. Shakir</u> , No. 03:98-cr-38	19

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Petitioner Jean Pierre Rices respectfully prays that a Writ of Certiorari issue to review the judgement and decision of the California Supreme Court entered on December 11, 2017.

OPINION BELOW

The California Supreme Court issued its opinion in this case on December 11, 2017, reported as *People v. Rices*, 4 Cal.5th 49, 406 P.3d 788 (2017). A copy of that opinion is attached as Appendix A.

JURISDICTION

Because the California Supreme Court issued its opinion on December 11, 2017, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the proscription contained in the Eighth Amendment to the United States Constitution against cruel and unusual punishment.

STATEMENT OF THE CASE

Along with his co-defendant Anthony Miller, petitioner Jean Pierre Rices was charged with two counts of special circumstances murder arising out of the shooting death of two store clerks during a March 1, 2006 robbery. Although the two defendants would be tried together, the state sought death against petitioner Rices alone.

Because petitioner forthrightly conceded his guilt as to the murder charges by pleading guilty, two juries were seated. At the joint trial the state empaneled one jury to decide whether petitioner would live or die. At the same time the state empaneled a second jury to separately decide Miller's guilt of special circumstances murder.

At petitioner's trial, both sides presented evidence relevant to the jury's sentencing decision. For its part, in aggravation the state introduced evidence about the crime itself.

Because there were no independent eyewitnesses, the state relied heavily on testimony from co-defendant Miller, who described the robbery and shooting, claiming that he participated only under duress and petitioner did the actual shootings. 13 RT 1309-1321, 1939, 1958-1959. In addition to the circumstances of the crime, the state introduced evidence of several prior convictions including a robbery conviction petitioner suffered as a child. 15 RT 2307. In addition, the state introduced evidence that petitioner had committed an unrelated robbery and carjacking, also when he was a child. 15 RT 2208-2213. The prosecutor relied on this evidence, in part, during closing arguments in asking the jury to impose death. 19 RT 2748-2749.

For his part, petitioner presented substantial mitigating evidence about his childhood and upbringing, evidence that child developmental expert Dr. Rahn Minagawa characterized as “a pretty horrendous childhood.” 18 RT 2670. Perhaps the most distinctive and unusual feature of the mitigation case was actual eyewitness testimony to Jean Pierre’s mother literally abandoning him outside a Jack-in-the-Box restaurant in Los Angeles in 1987. At the time, Jean Pierre was only five years old; his mother was screaming at him to stay away from her and throwing rocks and beer cans at him as the little boy pleaded with her “Mama, I want to go, I want to go. Mama.” 17 RT 2430-2440. According to an eyewitness who reported this to police, Jean Pierre’s mother left him there and “never turned around to look back.” 17 RT 2434. Jean Pierre never saw his mother again.

In addition to the evidence of abandonment, petitioner presented evidence about the rest of his childhood as well -- including stays at the homes of various family

members and group homes. Petitioner's father appeared as a mitigation witness, as did his aunt, his maternal uncle, his grandfather, his grandmother and his great uncle. 17 RT 2447, 2461, 2500, 2514, 2517, 2536. During the mitigation testimony of Gloria Brook (petitioner's grandmother), defense counsel asked her "what the impact would be on Jean Pierre's family if he was to be executed?" 16 RT 2538. The trial court sustained the prosecution's immediate objection and later refused to instruct jurors they could "consider evidence about the impact the defendant's execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant's background or character." 16 RT 2538-2539; 19 RT 2719.

The jury imposed death.

REASONS FOR GRANTING CERTIORARI

In capital cases, California law permits prosecutors to introduce evidence of convictions and conduct which a defendant committed when he was a child, and then urge jurors to impose death based on that conduct. The state supreme court has long explained that the reason such evidence is admissible is to show "the capital offense was . . . undeterred by the community's previous criminal sanctions." *People v. Malone*, 47 Cal.3d 1, 46 (1988); *People v. Balderas*, 41 Cal.3d 144, 202 (1985).

In a series of cases over the last 15 years, however, this Court has noted the fundamental differences between adults and children. As more fully discussed below, the Court has accurately noted that children "are more vulnerable or susceptible to negative

influences and outside pressures,” they are “less susceptible to deterrence,” they do not make “cost-benefit analys[es]” before taking action, and their “lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions.” When the criminal justice system ignores these differences, it results in a “misguided [attempt] to equate the failings of a minor with those of an adult.” *Graham v. Florida*, 560 U.S. at 68.

Here, in the context of a capital penalty phase, California has done just that, equating prior misconduct committed by an adult with prior misconduct committed by a child. As discussed below, however, treating the prior conduct of a child the same as the prior conduct of an adult for purpose of enhancing punishment and imposing death improperly ignores the now-recognized differences between children and adults and constitutes a “misguided [attempt] to equate the failings of a minor with those of an adult.” A grant of certiorari is appropriate.

Certiorari is appropriate for a second reason as well. In *Payne v. Tennessee*, 501 U.S. 808, 823 (1991) this Court held that in order for the jury to understand the victim’s “uniqueness” as an individual, victim impact evidence -- testimony about the impact of the victim’s death on surviving family members -- was admissible. By analogy to *Payne*, petitioner in this case offered “execution impact” evidence -- evidence showing the impact of his execution on his surviving family members. Pursuant to long-standing California law, the trial court barred petitioner from presenting this evidence.

There is a sharp split of authority on whether the Eighth Amendment permits the state to bar such evidence. State courts in Oregon, Kansas, Mississippi, South Dakota and Delaware have recognized that such evidence is indeed mitigating. Federal district courts in Vermont, Pennsylvania and Arizona have reached the same conclusion. But state courts in California, Alabama, Texas, Pennsylvania, New Jersey and Missouri -- and at least one federal circuit court -- have reached precisely the opposite conclusion. Several jurisdictions have decisions going both ways. And circuit courts in both the Fifth and Ninth circuits have concluded that the merits of this issue cannot be squarely addressed in federal habeas review because of the limitations imposed by 28 U.S.C. § 2254(d).

In light of the split of authority, and both the new-rule doctrine of *Teague v. Lane*, 489 U.S. 288 and the constraints of 28 U.S.C. § 2254(d), it is unlikely this issue can ever be resolved in a case arising in federal habeas proceedings. In this situation -- when important federal questions cannot be reviewed in federal habeas proceedings -- it is appropriate to grant certiorari in a case which presents that issue on direct review. *See Spencer v. Georgia*, 500 U.S. 960, 961 (1991) (Kennedy, J., concurring in the denial of certiorari). This case presents the very situation Justice Kennedy envisioned in *Spencer*; because the merits of this issue will not be addressed in federal habeas proceedings, as a practical matter, the only way for this Court to resolve the split of authority is to grant certiorari in a case squarely presenting the issue on direct review. This is such a case.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO DECIDE IF THE EIGHTH AMENDMENT PERMITS JURORS TO IMPOSE DEATH ON A DEFENDANT BASED, IN PART, ON PRIOR CRIMINAL CONDUCT THE DEFENDANT COMMITTED AS A CHILD.

California Penal Code section 190.3, subdivision (b) provides that at a capital penalty phase, the state is authorized to introduce evidence showing “the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence” Subdivision (c) of that section permits the state to introduce evidence showing “[t]he presence . . . of any prior felony conviction.” The state supreme court has clearly stated that the purpose of permitting this evidence “is to show the capital offense was the culmination of the defendant’s habitual criminality -- that it was undeterred by the community’s previous criminal sanctions.” *People v. Malone*, 47 Cal.3d at 46. *Accord People v. Gurule*, 28 Cal.4th 557, 636 (2002). Under existing state law it does matter if the convictions and conduct occurred when the defendant was a child. *People v. Bivert*, 52 Cal.4th 96, 123 (2011); *People v. Lee*, 51 Cal.4th 620, 648-649 (2011).

The prosecutor here took full advantage of these rules, introducing one prior conviction which petitioner suffered as a child, as well as two incidents of prior criminal conduct petitioner committed when he was a child. 15 RT 2197-2201, 2202-2205, 2208-2213, 2214-2220, 2307. The trial court instructed the jury it could rely on this evidence in deciding whether petitioner would live or die. 19 RT 2735-2736, 2741. And, in fact, the prosecutor urged the jury to rely on this evidence in sentencing petitioner to die. 19 RT 2748-2749.

On appeal, petitioner contended that permitting the use of juvenile convictions and uncharged conduct in aggravation of a capital sentence was inconsistent with a trio of cases from this Court addressing application of the Eighth Amendment to harsh penalties imposed on children: *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012). In each of these cases the Court recognized the substantial differences between children and adults, differences which preclude applying traditional concepts of deterrence and punishment to juveniles. The state court rejected the argument. *People v. Rices*, 406 P.3d at 817-818. Certiorari is appropriate.

In *Roper v. Simmons*, 543 U.S. 551, this Court held that the death penalty could not be imposed on defendants who were under the age of eighteen at the time of the crime. In reaching this result, the Court noted that as compared to adults, teenagers have “[a] lack of maturity and an underdeveloped sense of responsibility”; they “are more vulnerable or susceptible to negative influences and outside pressures”; and their character “is not as well formed.” *Id.* at 569-70. Based on these basic differences, the Court concluded that “it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles” *Id.* at 571. This was “of special concern” to the Court precisely because “the same characteristics that render juveniles less culpable than adults suggest as well the juveniles will be less susceptible to deterrence.” *Ibid.* The Court noted what every parent knows -- “the likelihood that the teenage offender has made . . . [a] cost-benefit analysis . . . is so remote as to be virtually nonexistent.” *Id.* at 572.

In *Graham v. Florida*, 560 U.S. 48, the Court again recognized that traditional concepts of deterrence do not apply to juveniles. There, the Court addressed the question of whether juveniles could receive a life without parole term for a non-homicide offense. The Court cited scientific studies of adolescent brain structure and functioning which again confirmed the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later in life. Because “their characters are ‘not as well formed,’” the Court found that “it would be misguided to equate the failings of a minor with those of an adult.” *Graham v. Florida*, 560 U.S. at 68. The Court held that deterrence did not justify a life without parole sentence because -- in contrast to adults -- “juveniles’ ‘lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions’” *Id.* at 72.

Finally, in *Miller v. Alabama*, 567 U.S. 460 the Court again addressed the concept of deterrence in connection with juveniles. *Miller* addressed the question of whether a life without parole term imposed on a juvenile constituted cruel and unusual punishment even for a homicide. Ultimately, the Court “[did] not consider Jackson’s and Miller’s alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles” 567 U.S. at 479. Instead, the Court reversed the life without parole terms imposed in both of the cases before it by finding that the schemes under which they were imposed were improperly mandatory. *Id.* at 465.

But in reaching this more limited decision, it is important to note that the Court fully embraced the view of deterrence expressed in both *Roper* and *Graham*. As it had in

both *Roper* and *Graham*, the Court again recognized that because of the “immaturity, recklessness and impetuosity” with which juveniles act, they are less likely than adult to consider consequences and, as such, deterrence cannot justify imposing a life with parole term on a juvenile. *Id.* at 472.

The Court’s rationale in these cases directly undercuts the use of juvenile convictions and conduct to aggravate penalty in a capital case. As noted above, the reason prior felony convictions are permitted in aggravation at a penalty phase is to show “the capital offense was . . . undeterred by the community’s previous criminal sanctions.” *People v. Malone*, 47 Cal.3d at 46. This is entirely sensible when the prior conviction was committed by an adult. But the opinions in *Roper*, *Graham* and *Miller* establish that juveniles and adults should not be treated the same when it comes to assumptions about deterrence.

To the contrary, in light of what the Court has said regarding children and deterrence, there are two reasons the traditional rationale for admission of prior felony convictions at a capital penalty phase makes little sense when applied to juvenile convictions. First, in connection with a juvenile conviction, the decision to commit the prior crime itself was made by a juvenile who was not deterred by the criminal sanction applicable to that crime precisely because of a “lack of maturity and underdeveloped sense of responsibility.” *Graham v. Florida*, 560 U.S. at 72. Second, *Roper*, *Graham* and *Miller* all recognize that expecting deterrence from a conviction imposed on a juvenile -- as the state may legitimately expect from an adult -- is a “misguided [attempt] to equate the failings of a minor with those of an adult.” *Graham v. Florida*, 560 U.S. at 68.

Similarly, prior criminal conduct is admitted at the penalty phase to permit an assessment of the “character and history of a defendant to determine” the appropriate punishment. *People v. Tully*, 54 Cal.4th 952. Given this Court’s recognition that because of their brain structure, teenagers show “[a] lack of maturity and an underdeveloped sense of responsibility,” “are more vulnerable or susceptible to negative influences and outside pressures” and their character “is not as well formed” (*Roper*, 543 U.S. at 569-570), it seems both unfair and unreliable to permit decisions made and conduct taken as a juvenile to so heavily impact a jury’s subsequent decision as whether defendant should live or die. To treat adults and juveniles the same in this instance -- that is, to treat prior conduct committed as a juvenile the same as prior conduct committed as an adult for purposes of a capital sentencing phase -- runs square into the Court’s admonition that “it would be misguided to equate the failings of a minor with those of an adult.” *Graham v. Florida*, 560 U.S. at 68. But that is exactly what the state court has done here.

It is true, of course, that the *current* crime in this case was committed by petitioner when he was an adult. But that does not change the equation in any constitutionally significant way. Aggravating the capital murder here by relying on the fact that when he was a child, petitioner was not deterred from committing crimes by the criminal sanction available for that crime, or by conviction for those crimes, implicates the precise concerns identified in *Roper*, *Graham* and *Miller*. It ignores the impact of youth on the “lack of maturity and . . . underdeveloped sense of responsibility” which juveniles possess and which renders them “less culpable than adults . . . [and] less susceptible to deterrence.” *Roper v. Simmons*, 543 U.S. at 569-572.

Petitioner recognizes that in assessing an Eighth Amendment challenge to a practice, the Court “looks beyond historical conceptions to ‘the evolving standards of decency that mark the progress of a maturing society.’” *Graham v. Florida*, 560 U.S. at 58. *Accord Roper v. Simmons*, 543 U.S. at 561. In making this assessment, a reviewing court must look to “objective indicia of society’s standards, as expressed in legislative enactments” *Graham v. Florida*, 560 U.S. at 61. *Accord Roper v. Simmons*, 543 U.S. at 563. With these objective indicia in mind, the court must then bring its independent judgment to bear on the constitutional question. *Roper v. Simmons*, 543 U.S. at 563.

The objective criteria consistently point in the same direction. Legislation from around the country establishes a clear nationwide consensus recognizing that because of their more limited decision-making capabilities in weighing future consequence, juveniles must be protected from making decisions that can adversely impact the rest of their life.

There are many examples. As this Court noted in *Roper* itself, “[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.” *Roper v. Simmons*, 543 U.S. at 569. Every state precludes juveniles under the age of 18 from drinking alcohol. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 589 (2001). Every state precludes juveniles from using tobacco products. *See Clay v.*

American Tobacco Co., 188 F.R.D. 483, 486 (S.D. Ill. 1999). The vast majority of states do not even permit juveniles under 18 to decide whether to get a tattoo.¹

There is a basic, common strand -- a national consensus -- reflected by these consistent legislative judgments. Legislatures throughout the country recognize that as a class, juveniles are simply not developed enough to make the kinds of decisions which can impact the remainder of their life -- such as the decision to take up smoking, to drink, to marry, or even to get a tattoo. In turn, *Roper* and *Graham* recognized that the common concerns about maturity which animated these otherwise diverse legislative enactments are a key factor in assessing the constitutionality of a practice that involves juveniles.

Significantly, *Roper* and *Graham* do not stand alone in recognizing the special fragility of juveniles and the implication of this recognition in assessing the protection juveniles should be given. See, e.g., *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (“[T]he common law has reflected the reality that children are not adults” and has erected safeguards to “secure them from hurting themselves by their own improvident acts.”);

¹ See Ala. Code § 22-17A-2; Alaska Stat. Ann. §08.13.217; Ariz. Rev. Stat. Ann. § 13-3721; Ark. Stat. Ann. § 5-27-228; Cal. Penal Code § 653; Col. Rev. Stat. Ann. § 25-4-2103; Conn. Gen. Stat. § 19a-92g; Del. Code Ann. Title 11, Ch 5 § 1114(a); Fla. Stat. § 877.04; Ga. Code §16-5-71; Hawaii Rev. Stat. § 321-379; Idaho Code § 18-1523; Ill. Pub. Act 094-0684; Ind. Code Ann. § 35-42-2-7; Iowa Code § 135.37; Kan. Stat. Ann. § 65-1953; Ky. Rev. Stat. § 211.760; La. Rev. Stat. Ann. § 14:93.2; Me. Rev. Stat. Ann. Title 32, Ch. 63 § 4203; Mich. Comp. Laws Ann. § 333.13102; Minn. Stat. § 609.2246; Miss. Laws § 73-61-1; Mo. Rev. Stat. § 324.520; Mont. Code Ann. § 45-5-623; Neb. Rev. Stat. § Sec. 427 71-3; N.J. Stat. Ann. § 2C:40-21; N.C. Gen. Stat. § 14-400; N.D. Cent. Code § 12.1-31; Ohio Rev. Code Ann. § 3730.06; Okla. Stat. Title 21 § 842.1, 842.2; Pa. Cons. Stat. Title 18 § 6311; RI General Laws § 11-9-15; S.C. Code Ann. § 44-34-60; S.D. Codified Laws Ann. § 26-10-19; Tenn. Code Ann. § 62-38-207; Texas Health and Safety Code Ann. § 146.012; Utah Code Ann. § 76-10-2201; Vt. Stat. Ann. Title 26 § 4102; Va. Code § 18.2-371.3; Wash. Rev. Code § 26.28.085; W. Va. Code § 16-38-3; Wis. Stat. § 948.70; Wyo. Stat. § 14-3-107.

Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) (“Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults.”)

In sum, the state supreme court ruled here that it is entirely permissible for a prosecutor to urge jurors to impose death on a defendant by relying on actions the defendant took as a child. This violates not only the principles animating the Court’s decisions in *Miller*, *Graham*, and *Roper*, but a national consensus recognizing that juveniles are simply not mature enough to make decisions which impact the rest of their lives. The practice cannot be squared with the Eighth Amendment. Certiorari is appropriate.

II. CERTIORARI IS APPROPRIATE TO RESOLVE A SPLIT OF AUTHORITY AS TO WHETHER THE STATE MAY BAR A DEFENDANT FROM PRESENTING EVIDENCE ABOUT THE IMPACT OF AN EXECUTION ON THE DEFENDANT'S FAMILY.

In *Payne v. Tennessee*, 501 U.S. 808 this Court recognized that “evidence about . . . the impact of [a] murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed.” *Id.* at 826. A major premise of *Payne*’s rationale was that the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state. *Id.* at 820-826.

Defense counsel in this case sought to give voice to this premise. At the time of trial, petitioner had a young son named Demu. 17 RT 2538. As noted above, during the penalty phase the defense called a number of petitioner’s family to testify including his father, aunt, maternal uncle, grandfather, grandmother and great uncle. 17 RT 2447, 2461, 2500, 2514, 2517, 2536. Having presented all these family witnesses to the jury, during the testimony of petitioner’s grandmother defense counsel asked her “what the impact would be on Jean Pierre’s family if he was to be executed?” 16 RT 2538. The trial court sustained the prosecution’s immediate objection. 16 RT 2538-2539.

At the subsequent instructional conference, defense counsel asked the court to instruct jurors that they could “consider evidence about the impact the defendant's execution would have on (his/ her) family if that evidence demonstrates some positive quality of the defendant's background or character.” Having successfully objected to evidence of execution impact, the prosecutor opposed provision of this instruction

because “we just don’t believe there’s been any of that.” 18 RT 2693. The trial court refused to provide the instruction. 19 RT 2719.

On appeal, petitioner contended that the trial court’s exclusion of execution impact evidence was unconstitutional because the Eighth Amendment itself requires that such evidence be admissible in mitigation during the sentencing phase of a capital case. The state supreme court rejected the argument. 406 P.3d at 818-819.

Certiorari is appropriate. This Court has long noted that a state may not preclude the sentencer in a capital case from considering relevant evidence in support of a sentence less than death. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). “[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce” *Payne v. Tennessee*, 501 U.S. at 809.

And the Court has on several occasions noted the “low threshold for relevance” of mitigating evidence imposed by the Eighth Amendment. *Smith v. Texas*, 543 U.S. 37, 44 (2004); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004).) As those cases recognize, the Eighth Amendment does not permit a state to exclude evidence which “might serve as a basis for a sentence less than death.” *Tennard v. Dretke*, 542 U.S. at p. 287. So long as a “fact-finder could reasonably deem” the evidence to have mitigating value, a state may not preclude the defendant from presenting that evidence. *Smith v. Texas*, 543 U.S. at 44.

Indeed, it was precisely because of the broad latitude afforded capital defendants in presenting mitigating evidence that this Court reversed its opposition to victim impact

evidence and held that “evidence about . . . the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed.” *Payne v. Tennessee*, 501 U.S. at 826. In *Payne*, the Court overruled *Booth v. Maryland*, 482 U.S. 496 (1986) and held that testimony as to the impact of the murder on the victim’s surviving family was relevant and admissible. 501 U.S. at 826. As noted above, the underlying premise of *Payne* is that the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state. *Id.* at 820-826. In his concurring opinion, Justice Scalia explicitly noted that since the Eighth Amendment required the admission of all mitigating evidence on the defendant’s behalf, it could not preclude victim impact evidence because “the Eighth Amendment permits parity between mitigating and aggravating factors.” *Id.* at 833.

Equally important, the *Payne* majority explained that the impact of the victim’s death on his surviving family members was essential for the jury to understand the victim’s “uniqueness as an individual human being.” 501 U.S. at p. 823. *Accord Id.* at 831 (O’Connor, J., concurring) and 835, 837 (Souter, J., concurring). Significantly, *Payne* also explained that the Court’s broad rulings requiring admission of “any mitigating evidence” were also premised on the need to ensure the jury understood the defendant as a “uniquely individual human being.” 501 U.S. at 822.

In short, *Payne* held that the impact of a victim’s death on the victim’s family is essential for the jury to understand the *victim* as a unique human being. It follows that the impact of the defendant’s death on his own family is equally essential for the jury to understand the *defendant’s* uniqueness as a human being. The articulated rationale of

Payne -- that there should be parity between the type of evidence available to the state and the defendant at the sentencing phase of a capital case -- compels a conclusion that sentence impact considerations are equally relevant. In accord with the Court's longtime Eighth Amendment jurisprudence, evidence showing the defendant's uniqueness as a human being may not be excluded from a capital penalty phase. *See, e.g., Lockett v. Ohio*, 438 U.S. at 605; *Eddings v. Oklahoma*, 455 U.S. at 110.

There is a stark split of authority on this question through the state and federal courts of the country. Many state courts throughout the country have recognized that a defendant's execution impact evidence is relevant to the sentencing decision. *See, e.g., State v. Stevens*, 879 P.2d 162, 167-168 (Oregon 1994) (concluding that this Court's mandate for broad consideration of mitigating circumstances requires consideration of the impact of an execution on the defendant's family); *State v. Carr*, 300 Kan. 1, 292 (Kan. 2014), overruled on other grounds *State v. Carr*, ___ U.S. ___, 136 S.Ct 633 (2016). *Accord State v. Simmons*, 944 S.W.2d 165, 187 (Miss. 1997) (noting mitigating evidence that defendant's "death at the hands of the state would injure his family"); *State v. Rhines*, 548 N.W.2d 415, 446-447 (S.D. 1996) (noting mitigating evidence of "the negative effect [defendant's] death would have on his family"); *Lawrie v. State*, 643 A.2d 1336, 1339 (Del. 1993) (noting that defendant's "execution would have a substantially adverse impact on his seven year-old son . . . and on [defendant's] mother"). Numerous federal courts have reached the same result, recognizing that "[e]xecution impact evidence is comparable in some respects to victim impact evidence" and holding that "evidence that those close to a capital defendant will be adversely affected by his execution may shed some light on the defendant's character, illustrating that he is capable of creating and maintaining meaningful interpersonal relationships with others, and thus, potentially

mitigating against the imposition of the death penalty.” *United States v. Con-Ui*, 2017 WL 1410913 at * 2 (M.D. Pa. Apr. 20, 2017). *Accord United States v. Fell*, 2005 WL 1634067, at *2 (D. Vt. July 5, 2005) (“Third party impact testimony may shed light on [defendant’s] background and character by providing testimony about any ‘positive qualities,’ ‘his capacity to be of emotional value to others’ and the nature of his interpersonal relationships.”); *Richmond v. Ricketts*, 640 F.Supp. 767, 792 (D. Ariz. 1986) (noting trial court’s consideration of testimony relating “the impact of the execution” on defendant’s family), *rev’d. on other grounds, Richmond v. Lewis*, 506 U.S. 50 (1992).²

But many courts, like the state court here, have reached precisely the opposite conclusion, holding that execution impact evidence is *not* relevant mitigation. *See, e.g., Woods v. State*, 13 So.3d 1, 33-34 (Ala. 2007); *Roberts v. State* 220 S.W.3d 521, 532 (Tex.Crim.App. 2007); *Commonwealth v. Harris*, 817 A.2d 1033, 1054 (Pa. 2002); *Burns v. State*, 699 So.2d 646, 654 (Fla.1997); *State v. Loftin*, 680 A.2d 677, 712–13 (N.J. 1996); *Williams v. State*, 168 S.W.3d 433, 445 (Mo. 2005). At least one federal circuit

² In addition, the verdict forms in numerous federal capital reveal that capital juries are often presented with and weigh execution impact evidence as mitigation. *See, e.g. United States v. Ronell Wilson*, p.10, No. 04-1016 (E.D. N.Y. July 24, 2013) (defendant’s family members “will suffer grief and loss if he is executed”); *United States v. Savage*, p.58, No. 07-550-03 (E.D. Pa. May 31, 2013) (defendant’s “execution will cause his family great emotional pain and distress”); *United States v. Basciano*, p.5, No. 1:05-cr-60 (E.D. N.Y. June 1, 2011) (defendant’s family “will suffer grief and loss if he is executed”); *United States v. O’Reilly*, p.22, No. 2:05-cr-80025 (E.D. Mich. Aug. 25, 2010) (defendant’s execution would “cause harm” and “grief or loss” to his family); *United States v. Shakir*, p.36, No. 03:98-cr-38 (M.D. Tenn. May 20, 2008) (defendant’s “execution . . . would have a particularly harsh impact on [h]is child”).

court has reached this same result as well. *See, e.g., United States v. Taylor*, 814 F.3d 340, 369 (6th Cir. 2016).³

Indeed, the split of authority on this question is so stark that a number of states have issued conflicting decisions and taken *both* positions, in some cases declaring execution impact inadmissible while in others explicitly recognizing that execution impact evidence is proper mitigation. *Compare State v. Mann*, 934 P.2d 784, 795 (Ariz. 1997) (recognizing that evidence showing “the effect on [defendant's children] if he were executed” is a mitigating factor) *with State v. Rogue*, 141 P.3d 368, 397 (Ariz. 2006) (without citing *Mann*, court concludes that execution impact evidence is “not relevant mitigating evidence”); *State v. Benn*, 845 P.2d 289, 316 (Wash. 1993) (recognizing that evidence showing “the loss to [defendant’s] loved ones if he were sentenced to death” is a mitigating factor) *with State v. Stenson*, 940 P.2d 1239, 1281-1282 (Wash. 1997) (without citing *Benn*, court concludes that execution impact evidence is “not relevant”).

The parties to this litigation will undoubtedly disagree about whether execution impact evidence is proper mitigation. That is to be expected in an adversary system. But there should be no disagreement that the answer to this question in any individual case should not depend on the fortuity of where the case happens to be tried or which particular conflicting authority a trial court chooses to follow.

³ Several other circuit courts have addressed the issue in federal habeas proceedings under 28 U.S.C. § 2254. In light of the limitations 28 U.S.C. § 2254(d) imposes on the ability of a federal court to grant habeas relief, these courts have not decided the merits of the issue, but have simply held that the state court decisions excluding this evidence were not “objectively unreasonable.” *Stenson v. Lambert*, 504 F.2d 873, 892 (9th Cir. 2007); *Jackson v. Dretke*, 450 F.3d 614, 618 (5th Cir. 2006).

Instead, as Chief Justice Roberts has observed, certiorari is appropriate when “[t]he conflict is clear and the stakes are high.” *Virginia v. Harris*, 558 U.S. 978, 130 S. Ct. 10, 12 (2009) (Roberts, C.J., dissenting from a denial of certiorari). That is precisely the case here -- the above cases establish the conflict is clear and the stakes are certainly high -- in capital cases, some courts are excluding evidence which numerous other courts around the country have explicitly recognized can serve as a basis for a sentence less than death. Certiorari is appropriate to resolve this split of authority. *See, e.g., Goodyear Tire & Rubber Co. v. Haeger*, ___ U.S. ___, 137 S. Ct. 1178, 1185 (2017) (granting certiorari to resolve a split of authority); *United States v. Castleman*, ___ U.S. ___, 134 S. Ct. 1405, 1410 (2014) (same); *Mississippi ex rel. Hood v. AU Optronics Corp.*, ___ U.S. ___, 134 S. Ct. 736 741 (2014) (same); *Missouri v. McNeely*, 569 U.S. 141, 147 (2013) (same); *Hall v. United States*, 566 U.S. 506, 511 (2012) (same).

CONCLUSION

For all these reasons certiorari is appropriate.

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Respectfully submitted,



Cliff Gardner
Attorney for Petitioner
Jean Pierre Rices